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In The

Supreme Court of the United States

October Term, 1994

ZELLA HININGER,

Petitioner,

vs.

CAN-AM INDUSTRIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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Can-Am's arguments further illustrate why this Court should grant the petition and resolve the conflict among circuits on the availability of damages for economic losses caused by common law negligence. Can-Am seeks to deny recovery for negligence by miscasting this as a suit for strict products liability or breach of contract. This is the same analysis employed by the Fifth and Tenth Circuits, yet rejected by the Eleventh Circuit and a district court sitting in the Eighth Circuit. The result is a growing conflict among circuits and misapplication of the holding in *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 78, 83 (Tex. 1977).

A. Nobility Homes is not Dicta.

The Texas Supreme Court has held that economic loss is recoverable for common law negligence. *Id.*[1] Twice the court announced this rule. *Id.*

Nobility Homes was the first of a series of cases in which the Texas Supreme Court sought to reconcile the application of the growing number of claims and remedies available to Plaintiffs. It clarified that economic losses were recoverable for breach of UCC warranties and common law negligence. *Id.* at 83.

Subsequent Texas Supreme Court decisions have never departed from this clearly pronounced rule of Texas substantive law. Instead, subsequent decisions applied to markedly different situations where differing theories of recovery resulted in different holdings.

B. The Contract/Tort Dichotomy.

Can-Am's attempt to restrict Hininger to contract remedies is based upon cases in which the action sounded in contract alone. *Hininger* is a garden variety negligence case. There was no Hininger/Can-Am contract. This distinguishes the precedent relied upon by Can-Am and the court of appeals.

For example, the court in *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617 (Tex. 1986), addressed whether an independent tort existed to support an award of exemplary damages. Holding the economic loss was the

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[1] Can-Am agreed with Hininger's interpretation of *Nobility Homes* at oral argument before the court of appeals.

subject of a contract, the *Jim Walter Homes* court determined the action sounded in contract alone, not in tort, and denied recovery of exemplary damages. *Id.* at 618. The decision in *Jim Walter Homes* serves only to illustrate the distinctions between actions sounding in contract and those based upon a tort.

The contract/tort dichotomy is also illustrated in *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991), cited by Can-Am. In *DeLanney*, the court addressed a breach of a contract to publish advertising. The *DeLanney* court made it clear that the failure to publish advertising was not a tort; instead, DeLanney's claims arose solely from breach of the contract. *Id.*

Can-Am and the court of appeals simply failed to distinguish between actions sounding in contract, and those sounding in tort. By failing to make such a fundamental, threshold characterization, the court of appeals' analysis is fundamentally flawed. This is a negligence case. There was no Hininger/Can-Am contract. Therefore, the remedies are provided by tort law, not contract law.

C. This is not a Strict Products Liability Case.

Can-Am mischaracterizes this as a products liability case. The case was submitted to the jury on common law theories of negligent manufacturing and breach of warranty as well as under the Texas Deceptive Trade Practices Act.[2] Strict products liability was abandoned at trial.

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[2] TEX. BUS & COM. CODE ANN. § 17.41 *et seq.* (Vernon 1987).

Indeed, both Can-Am and the court of appeals misanalyze *Hininger* as a products liability case. *Hininger v. Case Corp.*, 23 F.2d 124, 125 (5th Cir. 1994) (App. 2) (Brief in Opposition 5). While the phrase may be loosely descriptive of cases involving defective goods, it should not be confused as restricting clearly defined remedies.

Can-Am's reliance upon *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 311 (Tex. 1978), a strict liability case, is, therefore, misplaced. *Mid Continent Aircraft* did not overrule *Nobility Homes*. Nor is *Mid Continent Aircraft* applicable to the instant case.

Mid Continent Aircraft involved an unreasonably dangerous product defect which harmed only the product itself. *Id.* Mid Continent Aircraft sold an airplane under an "as is" contract of sale. *Id.* at 310. The plane crashed causing extensive damage to the product itself. Neither the pilot nor the surrounding property was damaged. *Id.* Curry County sued Mid Continent Aircraft for strict products liability rather than negligence.

The Texas Supreme Court held that damage to the product itself is not recoverable in strict products liability. *Id.* at 311-13. Such damage constitutes economic loss recoverable for breach of an implied warranty under the Uniform Commercial Code when a contract forms the basis of the transaction. *Id.* at 312.

By contrast, this is not a strict products liability case. Nor is Hininger seeking recovery merely for the damaged

product. Hininger claimed damage for consequential losses including costs of repair and lost profits.[3]

Any question of whether *Mid Continent Aircraft* was limited to the narrow issue of whether section 402A strict products liability provided a remedy for damage to the defective product itself was eliminated by a companion case. In *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320, 325 (Tex. 1978), the Supreme Court of Texas allowed recovery of economic loss under a strict products liability theory because the product damaged not only itself, but also *surrounding property. Id.* (emphasis added). The underlying facts in *Signal Oil* involved a complex written commercial contract for the purchase of a heater unit. *Id.* at 323. The unit exploded causing damage to itself and the surrounding equipment. The collateral property damage afforded relief to the purchaser under any available theory of recovery, including Section 402A of the Restatement (Second) of Torts or the Texas Uniform Commercial Code. *Id.*[4]

In both *Mid Continent* and *Signal Oil*, the court defined the boundaries of recovery under a strict liability theory. Claims for negligence were not before the Texas Supreme Court in either case. Nor did the Court pass

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[3] This case is not controlled by *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) either, where this Court applied substantive admiralty law. *Hininger* is a diversity case requiring application of the substantive law of the forum state. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

[4] The purchaser also asserted a claim for negligence. *Id.* Contributory negligence barred the recovery. That finding was not challenged on appeal. *Id.*

upon the viability of negligence claims for recovery of economic loss. *Hininger,* however, is a pure negligence case.

D. This is a Remedy Case, not a Duty Case.

The question of whether a component part manufacturer owes a duty to a retail purchaser is not before this Court. Addressing duty, Can-Am claims that Hininger cannot recover from a component supplier, such as itself. (Brief in Opposition 5, 8). The questions presented in Hininger's Petition for a Writ of Certiorari do not address duty. The question presented for review is the propriety of the court of appeals' denial of a remedy recognized by the forum state.

The Petition was filed because the court of appeals deprived Hininger of a remedy recognized by the Supreme Court of Texas. The court of appeals deepened a growing conflict among circuits by misapplying the substantive law of Texas on the identical question before this Court. The published decision has denied Hininger a remedy she would have received in a Texas state court. Unless corrected, the divergence in the federal circuits interpreting such basic state common law remedies will continue.

CONCLUSION

For the reasons and authorities set forth, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

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